

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

EUGENE COLEY,

Petitioner,

VS.

KHELLEH KONTEH, WARDEN,

Respondent.

CASE NO. 3:05-CV-121

OPINION & ORDER

[Resolving Docs. No. [1](#), [18](#)]

JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

With this Opinion and Order, the Court decides whether to adopt the Report and Recommendation of Magistrate Judge James Gallas on the Petitioner’s 28 U.S.C. § 2254 application for a writ of habeas corpus. [Docs. [1](#), [18](#).] For the following reasons, the Court **ADOPTS** the Magistrate’s Report and Recommendation and **DENIES** the Petitioner’s § 2254 petition.

On January 21, 2005, Petitioner Eugene Coley (“Coley”) filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. [Doc. [1](#).] This petition seeks federal review of Petitioner Coley’s state court convictions on two counts of aggravated robbery with gun specifications and one count of carrying a concealed weapon. [Id.](#) at 3. The sole issue presented in this habeas petition is whether the trial court’s decision to require the Petitioner to demonstrate holding a gun during the trial was unfairly prejudicial and violated his due process rights under the Fifth and Fourteenth Amendments. [Id.](#)

This Court referred the case to Magistrate Judge James Gallas for a Report and

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Recommendation on March 15, 2005. [Doc. [6](#).] The Respondent filed a return of writ on August 8, 2005. [Doc. [12](#).] On December 18, 2007, the Magistrate issued a Report and Recommendation recommending that this Court deny the Petitioner's habeas petition. [Doc. [18](#).] In his report, the Magistrate concluded that the Petitioner had cause to excuse the procedural default that occurred when he failed to file a timely appeal to the Ohio Supreme Court, but that the Petitioner did not demonstrate actual prejudice because the result of the proceeding would have been the same. *Id.* at 5-10. The Magistrate found that the trial court's decision to require the Petitioner to handle a gun during the trial did not violate clearly established federal or Ohio state law because it was a nontestimonial act outside the scope of Fifth Amendment protection. *Id.* at 8-11. The Petitioner did not object to the Magistrate's report.

The Federal Magistrates Act requires a district court to conduct a *de novo* review only of those portions of the Report to which an objection has been made. See [28 U.S.C. § 636\(b\)\(1\)](#). Any objections must be filed with the Clerk of Court within ten days of the report's issuance. *Id.* Parties waive their right to appeal the Recommendation if they fail to object within the time allowed. See, e.g., [Thomas v. Arn, 474 U.S. 140 \(1985\)](#); [United States v. Walters, 638 F.2d 947 \(6th Cir. 1981\)](#).

In this case, the Magistrate Judge has recommended that this Court dismiss the Petitioner's habeas corpus petition and the Petitioner did not object to the Magistrate's report. Having conducted its own review of the filing, facts, and findings in the case, the Court agrees with the conclusion of Magistrate Judge Gallas.

The Court therefore **ADOPTS** the Magistrate's Report and Recommendation and **DENIES** Petitioner's application for writ of habeas corpus. The Court incorporates Magistrate Judge Gallas's findings of fact and conclusions of law fully herein by reference. Further, the Court certifies,

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pursuant to [28 U.S.C. § 1915\(a\)\(3\)](#), that an appeal from this decision could not be taken in good faith, and no basis exists upon which to issue a certificate of appealability. [28 U.S.C. § 2453\(c\)](#); [Fed. R. App. P. 22\(b\)](#).

IT IS SO ORDERED.

Dated: February 5, 2008

s/ *James S. Gwin*
JAMES S. GWIN
UNITED STATES DISTRICT JUDGE